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March 16, 2006

Via Hand Delivery

Ms. Marlene Dortch, Secretary Federal Communications Commission The Portals, TW-A325 445 12th Street SW Washington, DC 20554 RECEIVED

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Federal Communications Commission Office of Secretary

Re:

Notice of Ex Parte Presentation – WC Dkt. 04-440, In the Matter of Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from the Title II and Computer Inquiry Rules with Respect to Broadband Services

Dear Ms Dortch:

On March 15, 2006, Dave Baker, Vice President, Law and Public Policy, EarthLink, Inc., discussed with Jessica Rosenworcel, Legal Advisor to Commissioner Copps, and Dana Shaffer, Legal Advisor to Commissioner Tate, in separate telephone conversations, the attached letter concerning the referenced proceeding.

Pursuant to the Commission's rules, please find two copies of this filing for inclusion in the public record of the above-referenced docket. Please do not hesitate to contact me directly should you have any questions.

Respectfully submitted

Donna N. Lampert
Counsel for EarthLink, Inc.

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Dear Ms Dortch:

EarthLink, Inc., respectfully urges the FCC to deny the Petition in the above-referenced proceeding as inconsistent with the statutory requirements of Section 10 of the Communications Act and contrary to the public interest. The available evidence cannot support a conclusion of effective national competition in the broadband marketplace to justify forbearance under the Section 10 standard and FCC and judicial precedent.

The plain language of Section 10(a) commands the Commission to grant forbearance only when it can "determine[]" the statutory criteria are met on the basis of "geographic markets" and "telecommunications services." Thus, the statute calls for the Commission to grant forbearance only based on an assessment of the state of the market considering particular geographic markets and for specific telecommunications services. Though Verizon seeks to

"we recognize the strong relationship between the statutory forbearance criteria and the Commission's dominance analysis, particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers. . . . Specifically, section 10(a)'s mandate to forbear for a 'telecommunications service, or class of . . . telecommunications service' in any or some of a carrier's 'geographic markets' closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively. Accordingly, as we evaluate the regulations at issue pursuant to the Section 10 standard below, our inquiry is informed by the Commission's traditional market power analysis."

(footnote continued on next page)

¹ 47 U.S.C. § 160(a) (2006).

² The Commission reiterated this statutory interpretation just recently:

EarthLink Ex Parte – WC Dkt. 04-440 March 15, 2006 Page 2

justify national Title II forbearance on the grounds that the broadband services markets are "dynamic," this provides no basis to ignore well-settled tools of market analysis. Customers such as EarthLink will be impacted in its broadband service options should the requested relief be granted, with Verizon's increased ability to offer services on terms that are unjust, unreasonable and discriminatory. Indeed, EarthLink has already encountered such conduct in connection with services purchased from Verizon that were deregulated in the FCC's Wireline Broadband Order, including discriminatory pricing and other tactics that provide affiliated entities a competitive "leg-up." Whether or not users are "sophisticated, high-volume purchasers," as Verizon asserts, does not substitute for actual and demonstrated competitive options.

The first prong of the Section 10 forbearance analysis, Section 10(a)(1), focuses on whether marketplace forces are sufficiently well established to supplant the need for the regulation or statute in question.³ In applying the language of the first prong – whether charges and practices will be "just and reasonable" and "not unjustly or unreasonably discriminatory" – the FCC routinely considers the effect of the proposed forbearance on wholesale and retail

(footnote continued from previous page)

In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order, WC Dkt. 04-223, FCC 05-170, ¶ 17 (rel. Dec. 5, 2005) ("Qwest Omaha Order").

³ This approach is consistent with longstanding FCC forbearance precedent finding that refraining from regulation is only appropriate where the carrier has no market power, such as the FCC's decision to engage in detariffing for interexchange services. In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order, 11 FCC Rcd. 20730, ¶¶ 8-14, 21-22 (1996) ("Detariffing Order") (describing history of FCC forbearance actions, background for Congressional enactment of Section 10, and need for FCC to consider market elasticities, costs, structure and firm resources in assessing forbearance); see also In the Matter of Hyperion Telecommunications Inc. Petition Requesting Forbearance, Memorandum Opinion and Order and Notice of Proposed Rulemaking 12 FCC Rcd. 8596, ¶ 24 (1997) (finding of no market power justifies detariffing); In the Matter of 2000 Biennial Regulatory Review; Policy and Rules Concerning the International Interexchange Marketplace, Report and Order, 16 FCC Rcd. 10647 (2001) (competition is basis for just and reasonable rates and consumer protection). Indeed, Section 10 was intended to codify the FCC's ability to forbear from regulation when market conditions supported such action and, as such, was modeled on the language of Sections 201 and 202 of the Act. See generally Detariffing Order at ¶¶ 7-13. See also H. R. Conf. Rep. No. 104-458, at 185 (1996) (describing competition showing as the basis for satisfaction of the forbearance standard.).

EarthLink *Ex Parte* – WC Dkt. 04-440 March 15, 2006 Page 3

customers, such as EarthLink.⁴ Thus, in this case, the Commission must consider whether the charges and practices facing customers of broadband services will be unjust, unreasonable, or unreasonably discriminatory if forbearance from Title II were granted.⁵ In particular, the FCC should examine, on a granular and location-specific level, whether competition exists since the existence of competition in one location will do nothing to ameliorate the lack of competitive options in another.⁶

Verizon's competition showing falls far short of demonstrating a level of competition substantial enough under the Section 10(a)(1) standard. In fact, Verizon's "data" generally consists of references to anecdotal reports of various competitive "successes," largely web links to competitive carrier service descriptions, and reliance on alleged competition from cable operators, mobile wireless providers, fixed wireless and others regardless of whether these alternatives are viable or even available in particular markets. While Verizon protests that there is national broadband competition, it fails to demonstrate a robustly competitive market for the

⁴ See, e.g., <u>Depreciation Forbearance Order</u>, ¶ 63 (forbearance must be denied if "forbearance would be likely to raise prices for interconnection and UNEs, (particularly those that may constitute bottleneck facilities) inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service."). See also id. ¶¶ 54, 68.

⁵ In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Third Memorandum Opinion and Order, 14 FCC Rcd. 10816, ¶ 12 (1999) (first prong of Section 10 forbearance test not met where "independent LECs have sufficient ability through their control of bottleneck facilities to harm the in-region long distance services market by engaging in cost misallocation, access discrimination, and price squeeze."); Depreciation Forbearance Order, ¶ 54 (1999) (Under first prong of forbearance test, incumbent LECs failed to "demonstrate[] that the local exchange market is sufficiently competitive" to warrant forbearance).

⁶ See, e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [defendant's] ability to lessen or destroy competition.").

The Commission has held that "both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market." In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, ¶ 289 (2003); See, PCIA Forbearance Order, ¶¶ 22, 23 (declining to find CMRS marketplace sufficiently competitive where some of six competitive PCS licensees may not have begun to offer service).

EarthLink *Ex Parte* – WC Dkt. 04-440 March 15, 2006 Page 4

broadband services at issue.⁸ As the FCC has been repeatedly informed,⁹ the so-called "competition" Verizon relies on to demonstrate competition is simply not ubiquitous, if it exists at all; nothing in Verizon's filings are to the contrary.¹⁰ Likewise, as to Section 10(a)(2), Verizon simply repeats the same "competition" conclusions presented under the first prong, but fails to show that the "regulations are no longer in the public interest because competition

⁸ ITTA Cost Support Order, ¶ 19 (incumbent LECs failed to meet first prong of Section 10 forbearance standard where incumbents did not demonstrate that they face "substantial competition"). SBC Structural Forbearance Order, ¶ 13 (forbearance granted only where there was evidence of substantial competition and evidence that BOC "does not exercise monopoly power over the components" of the service). As the Commission has explained, "[i]n order to satisfy the first prong of the three-part forbearance analysis, the BOC petitioners must make a prima facie showing that sufficient competition exists so that application of the Commission's rate level, tariffing, and rate structure rules is not necessary to ensure that the BOC petitioners' rates and practices for the services in question are just, reasonable, and not unreasonably discriminatory." Special Access Forbearance Order ¶ 32.

⁹ See, e.g., Letters from Donna N. Lampert, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. 01-338 et al. (Oct. 12, 2004); (May 27, 2004); (Apr. 16, 2004); (Mar. 25, 2004); (Mar. 19, 2004); (Mar. 10, 2004); see also Letter from Mark J. O'Connor, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, FCC CC Dkt. 02-33 (Aug. 2, 2005); Letter from Donna N. Lampert, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, FCC CC Dkt. 02-33 (Aug. 3, 2005).

According to the FCC's own data, fixed wireless and satellite hold a combined 1.3% market share. "High Speed Services for Internet Access: Status as of December 31, 2003," Chart 2 – High-Speed Lines by Technology. Further, the FCC has recognized that "no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market" and "at present, fixed wireless and satellite services remain nascent technologies, with limited availability, when used to provide broadband services to the mass market." Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶ 233, 231 (2003) ("TRO") as modified by Errata, 18 FCC Rcd. 19020 (2003) vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC. 359 F.3d 554 (D.C. Cir. 2004); see also In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, 20 FCC Red. 14117, ¶ 44 (2005) ("Although DBS is a national service, we continue to monitor technical limitations, such as line of sight, which impede the availability of DBS.").

EarthLink Ex Parte – WC Dkt. 04-440 March 15, 2006 Page 5

between providers renders the regulations no longer meaningful." Similarly, Verizon fails to engage in a thorough and reasoned public interest analysis pursuant to Section 10(a)(3). Thus, while Verizon asserts that forbearance will encourage it to invest in and deploy innovative broadband technologies, nowhere does Verizon acknowledge, let alone assess, the public interest harms that will result from this loss of broadband competition. Especially given the potential financial interest Verizon has to the extent its services are used in connection with competing services such as VoIP, it is hard to imagine how the concern regarding unjust, unreasonable and discriminatory rates could be ameliorated. As such, the FCC must to deny the Petition. ¹³

Notably, the Commission has consistently rejected requests for forbearance where "[t]he record does not contain a market analysis of competition within particular geographic markets with respect to any of the requests for forbearance." Rather, the Commission has granted forbearance only where there is specific data applied in a traditional market analysis, ¹⁵ and has

¹¹ H. R. Conf. Rep. No. 104-458, at 185 (1996); 47 U.S.C. § 160(a)(2).

¹² 47 U.S.C. § 160(a)(3).

Special Access Forbearance Order, ¶34 ("because the BOC petitioners have failed to show that competition will constrain anti-competitive conduct by them, the public interest is best served by continued regulation of special access and high capacity dedicated transport services which is designed to foster competition for these services.").

¹⁴ PCIA Forbearance Order, ¶ 22 n. 66. See also, In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Sixth Memorandum Opinion and Order, 14 FCC Rcd. 10840 (1999) ("ITTA Cost Support Order") (incumbent LECs failed to meet Section 10 forbearance standard where petition did not contain evidence of "substantial competition"); In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, Memorandum Opinion and Order, 20 FCC Rcd. 9361, ¶ 14 (2005) ("SBC Title II Forbearance Order") (denying forbearance, in part, for failing to provide specific information and evidence); In the Matter of 1998 Biennial Regulatory Review - Review of Depreciation Requirements for Incumbent Local Exchange Carriers, Report and Order in CC Docket No. 98-137 Memorandum Opinion and Order in ADS 98-91, 15 FCC Rcd. 242, ¶ 54 (1999) ("Depreciation Forbearance" Order") (forbearance denied where incumbent LECs failed to "demonstrate[] that the local exchange market is sufficiently competitive" to warrant forbearance). Just last month, the Commission affirmed its use of a traditional market analysis, requiring detailed market evidence in assessing Section 10 forbearance. Qwest Omaha Order, ¶ 14 ("As part of our forbearance analysis . . . we look to the Commission's previous case law on dominance for guidance.").

US West Declaratory Ruling, ¶ 33 (forbearance petition granted upon specific evidence of substantial market competition); In the Matter of Petition of SBC Communications Inc for Forbearance of Structural Separation Requirements, Memorandum Opinion and Order, 18 FCC (footnote continued on next page)

EarthLink *Ex Parte* – WC Dkt. 04-440 March 15, 2006 Page 6

held that to obtain forbearance "[t]he BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners' claims." Here, however, instead of demonstrating how the competition facts offer the basis to grant forbearance, Verizon relies on the selection of a few data points to prop up the "competition" assertions. Notably, Verizon has provided far less specific market analysis than was deemed inadequate in the Special Access Forbearance Order. At bottom, the cursory assemblage of references contained in Verizon's filings is simply not what the D.C. Circuit has explained is the "painstaking analysis of market conditions such as that which is required . . . under Section 10 of the Communications Act."

(footnote continued from previous page)

Rcd. 8134, ¶ 13 (2003) ("SBC Structural Forbearance Order") (forbearance granted only where record evidence demonstrated substantial competition and evidence that BOC "does not exercise monopoly power over the components" of the service).

the FCC has considered this question on several occasions, each time applying a test different from that applied here to determine whether the firm in question retained market power. For instance, in the Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3,271 (1995) the FCC considered four factors: (1) 'AT&T's market share'; (2) 'the supply elasticity of the market'; (3) 'the demand elasticity of AT&T's customers'; and (4) 'AT&T's cost structure, size and resources.' This approach was also followed in subsequent proceedings before the agency. Yet, in evaluating US West's petition, the FCC ended its inquiry once it deemed the market share data inadequate.

Petition of US West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, Memorandum Opinion and Order, 14 FCC Rcd. 19947, ¶ 25 (1999) ("Special Access Forbearance Order"), reversed and remanded on other grounds, AT&T Corp., 236 F.3d 729.

As the D.C. Circuit has noted in reviewing a prior Commission Section 10 forbearance order, "[i]n the past, the FCC has considered market share along with other factors such as supply elasticity, demand elasticity and comparative advantages in cost structure, size and resources." <u>AT&T Corp. v. FCC</u>, 236 F.3d 729, 731 (D.C. Cir. 2001). The Court explained that the Commission's precedent clearly relies on a traditional market analysis to determine the sufficiency of competition, *id.* at 736 (internal citations omitted):

Specifically, the <u>Special Access Forbearance Order</u> rejected an economic report of the BOCs because it did not adequately disclose the report's underlying data. <u>Special Access Forbearance Order</u>, ¶ 25.

¹⁹ WorldCom, Inc. v. FCC, 238 F.3d 449, 459 (D.C. Cir. 2001).

EarthLink *Ex Parte* – WC Dkt. 04-440 March 15, 2006 Page 7

Moreover, by attempting to rely upon FCC conclusions made in the rulemaking context, Verizon improperly seeks to bypass the Section 10 standard. For example, Verizon attempts to substitute a series of citations to the "impairment" findings made in the <u>Triennial Review Order</u> and conclusions made in the <u>Wireline Broadband Order</u> for the requisite Section 10 analysis with. It is plain from the language of the Communications Act, however, and from the Commission's own precedent, that a Section 251(c) impairment finding is not synonymous with, and cannot substitute for, a finding of sufficient competition under a Section 10 market analysis. As the FCC has noted, unlike in the Section 251 impairment context where the FCC does not conduct a market power analysis, or the <u>Wireline Broadband Order</u> where the FCC classified broadband Internet access as an information service, Section 10 requires an assessment of market power and its impact on the affected customers; the Commission has denied or conditioned forbearance where there was not a sufficient showing of the absence of market power. Accordingly, since the Commission cannot find competition sufficient to keep rates and terms in check, the FCC should deny Verizon's Petition.

Significantly, while Verizon consistently urges that forbearance is necessary to encourage its innovation and investment, this is simply not relevant here. While the FCC in a Section 251 analysis can rely upon a balancing of statutory goals, Section 10(a)(1) does not permit the FCC either to ignore or counterbalance the statutory command to examine the impact of market power on "rates and charges" in order to accommodate other goals, even worthy goals such as broadband deployment. Simply put, though the Section 251 standard may permit a trade-off between short-term harms and longer term benefits, ²³ that is not the standard under

²⁰ See <u>TRO</u>, ¶¶ 109-110.

See, e.g., In the Matter of Petition of US WEST Communications, Inc for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Memorandum Opinion and Order, 14 FCC Red. 16252, ¶35 (1999) ("US West Declaratory Ruling") (conditioning grant of forbearance due to lack of competitive alternatives); In the Matters of Bell Operating Companies' Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, Memorandum Opinion and Order, 13 FCC Red. 2627, ¶36 (1998) (same). See also In the Matter of COMSAT Corp. Petition pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking, 13 FCC Red. 14083, ¶137 (1998) (declining to grant forbearance due to lack of competitive alternatives).

See In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, First Report and Order, 15 FCC Rcd. 17414, ¶13 (2000) ("Fixed Wireless Forbearance Order") (denying forbearance where record does not establish competition in the market necessary to protect consumers).

²³ USTA II, 359 F.3d at 588.

EarthLink *Ex Parte* – WC Dkt. 04-440 March 15, 2006 Page 8

Section 10(a)(1). By contrast, Section 10(a)(1) demands a detailed and specific analysis of "market conditions" supported by "empirical evidence," not an agency balancing of statutory objectives and goals. ²⁵ Moreover, FCC statements in connection with the classification of broadband Internet access services, while interesting, also do not form the basis to support forbearance.

Finally, Verizon also fails to explain why the FCC should abandon its precedent that forbearance requests such as this one that concern Section 201 and 202 of the Act, – the "core concepts of federal common carrier regulation dating back over a hundred years" – are to be granted, if at all, only after the most careful and thorough review of market conditions. ²⁶ Unfortunately, Verizon fails to offer any such thorough analysis and asks the FCC to brush aside the U.S. Supreme Court's recognition of "the significance of regulation" under the Act to act as an "effective steward for the antitrust function."

²⁴ See WorldCom Inc., 238 F.3d at 459; <u>AT&T Corp.</u>, 236 F.3d at 735-37.

Notably, even if investment incentives were relevant, the FCC should consider all potential investment, not just that of Verizon. Competitive LECs, broadband Internet companies, equipment vendors and others all invest substantially in various broadband services and facilities. Thus, assuming arguendo, that this is a proper inquiry, the FCC must consider all broadband investment.

PCIA Forbearance Order, ¶ 23. ("Assuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner. . . . The market may fail to deter providers from unreasonably denying service to, or discriminating against, customers whom they may view as less desirable."); SBC Title II Forbearance Order, ¶ 17 ("Because the language of section 10(a) essentially mirrors the language of Sections 201 and 202, the Commission expressed skepticism that it would ever be appropriate to forbear from applying those sections. Since then, the Commission has never granted a petition for forbearance from sections 201 and 202. If we were to grant such a petition now, we would have to provide a rationale for abandoning our own precedent.").

²⁷ Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 411, 413 (2004).

EarthLink Ex Parte – WC Dkt. 04-440 March 15, 2006 Page 9

For these reasons, EarthLink respectfully urges the FCC to deny Verizon's petition.

Sincerely,

/s/

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